

**Supplemental Letter of Findings: 04-20160001
Indiana Use Tax
For the Years 2012-2013**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Restaurant's protest of use tax assessed as a result of an audit is sustained based on the results of a supplemental audit.

ISSUE

I. Use Tax - Imposition.

Authority: IC § 6-2.5-1-2(a); IC § 2.5-2-1(a); IC § 2.5-2-1(b); IC § 2.5-3-2(a); IC § 2.5-4-1(b); IC § 6-8.1-5-1(c); IC § 6-2.5-3-5; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); [45 IAC 2.2-2-1](#); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-2](#).

Taxpayer protests the assessment of use tax.

STATEMENT OF FACTS

Taxpayer owns and operates restaurants throughout the country, including a restaurant in Indiana. The Indiana Department of Revenue ("Department") performed a sales and use tax audit of Taxpayer for tax years 2012 and 2013. Using a sample period of 2013, the Department found that "[T]axpayer did not pay sales tax at purchase or accrue and remit use tax on some purchases for its own use." The Department also determined that "some purchases on credit cards and petty cash purchases . . . did not have invoices or receipts showing that proper tax was paid on the purchases." Finally, the Department reviewed Taxpayer's depreciation schedules noting that Taxpayer purchased items for which Taxpayer "could not provide . . . evidence that sales tax was paid at purchase or use tax accrued and remitted"

As a result of the audit, Taxpayer was assessed additional use tax for the tax years at issue. Taxpayer protested the assessment, and presented additional evidence supporting the protest. An administrative hearing was held which Taxpayer failed to attend. Taxpayer requested a rehearing which was granted. This Letter of Findings results from that rehearing. Additional facts will be provided as necessary.

I. Use Tax - Imposition.

DISCUSSION

Pursuant to an audit, the Department assessed Taxpayer with additional use tax for tax years 2012 and 2013. Taxpayer now protests these assessments.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); see also Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480,

486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

Indiana also imposes a complementary use tax on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of the transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). A retail transaction is subject to use tax when the tangible personal property is "stored, used or otherwise consumed in Indiana . . . unless the Indiana state gross retail tax has been collected at the point of purchase." [45 IAC 2.2-3-4](#). When sales tax is not paid as a part of a retail transaction, use tax will be imposed unless the purchase is eligible for an exemption.

A. Capital Assets

In its protest, Taxpayer states that the audit's "taxable schedule for fixed assets included invoices with tax collected by vendor and transactions where use tax was accrued for the taxable portion of the items." Taxpayer specifically protested seven assets listed as taxable in the audit report. For four of these assets, Taxpayer claims that sales tax was collected by the vendor and has provided invoices in support of that claim. Upon review of this documentation, the Department agrees that sales tax was charged by the vendor on these four assets. Taxpayer is sustained on these four assets.

Taxpayer explains that two of the assets are information technology projects in which individual parts are delivered to Florida where they are assembled into completed assets such as laptops. The completed assets are distributed to Taxpayer's restaurants in various states. Taxpayer determines a total cost of the project and assigns a unit cost to each completed asset. Each restaurant records a value based on the number of completed assets at their location. The Department assessed additional use tax on the completed assets recorded in the Indiana restaurant. Taxpayer claims that sales tax is paid on the individual parts in Florida, thus use tax should not be accrued on the completed assets.

In support of its claim, Taxpayer provided copies of every vendor invoice from the respective project. Taxpayer argues that the vendor invoices show that Florida sales tax was collected on individual parts at the time of purchase, thus the resulting asset value assigned to the Indiana restaurant is not taxable. The Department cannot agree with Taxpayer's argument. The completed assets are used in Indiana, thus the completed assets are subject to Indiana use tax. IC § 6-2.5-3-5 allows for "a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, or use tax paid to another state. . . ." In order to claim that credit, Taxpayer must provide a breakdown of sales tax associated with each completed asset in the project. Taxpayer has failed to do so, thus Taxpayer's protest regarding the two information technology projects is denied.

Regarding the final asset, Taxpayer claims that it accrued use tax in part on the asset. In support, Taxpayer provided an Excel report of use tax accrual journal entries. In this report, Taxpayer has indicated two journal entries in which Taxpayer claims use tax on this asset was accrued in part. Taxpayer, however has not explained why use tax was accrued in part on this asset and further, has not provided any other documentation to support its claim. Taxpayer's protest regarding this asset is denied.

Taxpayer is sustained on its protest of the four assets where Taxpayer proved that the vendor collected sales tax. Taxpayer's protest of the remaining three assets is denied.

B. Sample Purchases

Taxpayer makes one other claim in its protest. Specifically, Taxpayer argues that the audit's "taxable expenses schedule contains several line items with the following issues: Nontaxable services invoices[, Invoices that we accrued and paid use tax[, and] Invoices that vendor collected sales tax." In support, Taxpayer provided a schedule of certain purchases from the audit sample. In this schedule, Taxpayer made comments for each purchase, explaining why the purchase is not subject to tax. Taxpayer indicated those purchases in which Taxpayer claims the vendor collected sales tax at the time of purchase, as an "online listing service." Taxpayer

explains that these purchases are all made through one vendor and Taxpayer provided two sets of sample invoices from this vendor to show that vendor typically charges sales tax only where appropriate. Sales for services only that do not involve tangible personal property are not subject to Indiana sales tax. [45 IAC 2.2-4-2](#). However, Taxpayer was unable to provide vendor invoices for the specific purchases under protest. Therefore, Taxpayer's protest in regard to the "online list service" purchases is denied.

Taxpayer made several other comments in the schedule. Some comments explain that the sampled purchase was for a service, thus not subject to sales or use tax. Other comments explain that the purchase is a monthly journal entry or that use tax was accrued on the purchase. Where use tax was purportedly accrued, Taxpayer provided an Excel report of use tax accrual journal entries showing the accrual. While Taxpayer's comments are helpful, Taxpayer failed to provide any documentation such as invoices in support of their comments. Thus, Taxpayer's protest in regard to the remaining purchases on the schedule is denied.

In conclusion, Taxpayer is sustained regarding its protest on the imposition of use tax on capital assets in which Taxpayer proved that the vendor collected sales tax at the time of purchase. Taxpayer is denied regarding its protest on the imposition of use tax on certain capital assets and certain sampled purchases.

FINDING

Taxpayers' protest is sustained in part and denied in part.

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